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Nos. 02-10038, 02-11309

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In the Supreme Court of the United States

ROBERT JAMES TENNARD,

Petitioner

v.

DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ROBERT SMITH,

Petitioner

v.

DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE TEXAS DEFENDER SERVICE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE TEXAS DEFENDER SERVICE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Texas Defender Service and the National Association of Criminal Defense Lawyers respectfully submit this brief as *amici curiae* in support of petitioners, Robert James Tennard and Robert Smith.[1]

[1] This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

INTEREST OF THE *AMICI CURIAE*

This Court has observed that "capital proceedings [must] be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Monge v. California*, 524 U.S. 721, 732 (1998), quoting *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part). The Texas Defender Service (TDS) and the National Association of Criminal Defense Lawyers (NACDL) believe that this goal can be achieved only through competent representation of capital defendants and death row inmates at all stages of the trial and appellate process.

TDS is a private, non-profit law firm founded in 1995. Its mission is to help improve the quality of representation afforded to indigent Texans charged with a capital crime or under sentence of death. The firm's activities include: (1) directly representing death row inmates at all levels of the appellate process; (2) presenting free continuing legal education seminars with the assistance and support of the American Bar Association's Death Penalty Representation Project; (3) tracking the status of Texas death penalty cases and intervening in emergency situations or recruiting private law firms to represent Texas death row inmates and consulting with such firms; and (4) participating in efforts of groups and organizations to improve access to and quality of capital representation in Texas. TDS's primary interest in these consolidated cases concerns their impact on the administration of the death penalty system in Texas. Although the issues presented in these cases apply directly only in Texas and then only to a small percentage of current death row inmates there—namely, those convicted for offenses occurring before September 1, 1991 (when Texas revised the capital sentencing statute at issue)—the Court's decision may have important implications for capital cases more generally in Texas and elsewhere.

NACDL is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide. NACDL has 80 state and local affiliate organizations, with a total of 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. In furtherance of its objectives NACDL files approximately 35 *amicus curiae* briefs a year, including several in this Court, on a variety of criminal justice issues. See NACDL's website at www.nacdl.org.

SUMMARY OF ARGUMENT

A death sentence may be imposed only when the sentencer has been permitted to consider, and give effect to, the defendant's character, background, and record, and the circumstances of the offense. The Court has been clear that evidence of this nature may not be excluded from the sentencer's deliberations. Nor may the sentencer's reasoned moral response to this evidence be stifled by sentencing procedures that prevent the sentencer from forming and expressing its view, in light of all of the mitigating evidence presented, concerning whether death or a sentence less than death is appropriate.

The former Texas capital sentencing scheme, which applies to offenses committed prior to 1991, and under which petitioners were sentenced, made no reference to mitigating evidence and did not advise the sentencer to decide whether death is the appropriate sentence in light of all of the evidence presented. Instead, it only asked the jury to answer three

questions related to the deliberateness of the defendant's acts, the likelihood that the defendant would be a further danger to society, and the reasonableness of the defendant's reaction to any provocation by the victim. Although the Court has held that the former Texas capital sentencing statute is *facially* constitutional, it also has ruled that Texas' application of the statute in certain cases unconstitutionally deviated from the fundamental principles underlying the Court's capital sentencing jurisprudence: (1) all mitigating evidence must be allowed to be presented to the sentencer, and (2) the sentencer must be permitted to give full effect to all of the mitigating evidence in rendering its reasoned moral response to the defendant and his crime. In particular, the Court has held that where the mitigating evidence is relevant beyond the three questions presented in the former Texas capital sentencing scheme, the statute *as applied* does not result in a constitutional sentencing determination.

The Fifth Circuit has misinterpreted the Court's capital sentencing jurisprudence, particularly the Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), in adopting a restrictive approach that effectively confines *Penry* to its facts and that requires mitigating evidence to satisfy two limiting criteria before the adequacy of the special issues in the former Texas capital sentencing statute will even be considered. First, the Fifth Circuit has declared that the constitutional principles applied in *Penry* are implicated only when the defendant presents mitigating evidence of a permanent, severe handicap from which he suffers through no fault of his own. If the mitigating evidence can qualify under this demanding test, it then must be shown to have a causal connection or "nexus" to the murder for which the defendant was convicted. Only in these narrow circumstances—which the court of appeals has almost never found in the 14 years since *Penry* was decided—has the Fifth Circuit been prepared to acknowledge that the special issues in the former Texas

statute may not be adequate to permit the jury fully to consider and give effect to the defendant's mitigating evidence.

The court of appeals' repeated efforts, in the cases now before the Court and others, to cabin *Penry* and to insist on the sufficiency of the former Texas special issues in virtually every case, cannot be reconciled with *Penry* itself or with this Court's numerous capital sentencing decisions during the past 27 years. For well over a decade, Texas itself has not adhered to its previous flawed scheme but instead has required that juries in capital cases be asked explicitly whether the defendant's mitigating evidence warrants a sentence less than death. This Court now should confirm, in the clearest possible terms, that exclusive reliance on the former Texas special issues is constitutionally impermissible where a defendant presents mitigating evidence that has significance beyond the scope of those specific questions.

ARGUMENT

I. A DEATH SENTENCE MAY NOT BE IMPOSED CONSTITUTIONALLY UNLESS THE SENTENCER HAS BEEN AFFORDED THE OPPORTUNITY TO CONSIDER, AND PROVIDE A REASONED MORAL RESPONSE TO, THE UNIQUELY INDIVIDUAL CHARACTERISTICS OF THE CONVICTED PERSON.

This Court has long recognized that sentencing determinations require "consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 61 (1937). This is never more true than in a capital case, as "death is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976) (plurality opinion);

Furman v. Georgia, 408 U.S. 238, 306 (1972) (per curiam) (Stewart, J., concurring) (The death penalty "is unique in its total irrevocability."). The irreversible nature of the death penalty requires that it be imposed only if, during the sentencing process, the convicted person is considered as a "uniquely individual human being[]." *Woodson*, 428 U.S. at 304 (plurality opinion).

More than just an "enlightened policy" drives the principle that sentencing determinations in capital cases must take into consideration the "character and record of the individual offender and the circumstances of the particular offense." *Id.* Rather, it is a "constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*; *see also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) ("The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.").

The requirement that the sentencer treat the defendant as a uniquely individual human being means that the sentencer must have a "'vehicle for expressing its reasoned moral response to [the mitigating] evidence in rendering its sentencing decision.'" *Penry v. Johnson*, 532 U .S. 782, 797 (2001) (*Penry II*) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (*Penry I*)). To ensure such a response, this Court has required that the jury have discretion to consider the defendant's mitigating evidence as it bears on his personal culpability. Juror consideration of all factors touching on moral culpability has been the touchstone of this Court's individualization requirement. This is reflected in a number of decisions culminating in *Penry I*.

In seeking to ensure that the proper individualized sentencing occurs in a death penalty case, this Court has said that the sentencer should "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character

or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. at 604 (plurality opinion) (emphasis in original) (quoted with approval in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Hitchcock v. Dugger*, 481 U.S. 393 (1987)). This basic principle has led the Court to strike down mandatory death penalty statutes in whatever form they appear. *Sumner v. Shuman*, 483 U.S. 66 (1987); *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

For example, the Court held that the North Carolina statute at issue in *Woodson* "accord[ed] no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense." *See Woodson*, 428 U.S. at 303 (plurality opinion). The mandatory death sentence thus improperly excluded consideration of "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.*[2]

But even when the sentencing authority is permitted to consider *some* mitigating evidence, the sentencing scheme still may fail to satisfy constitutional standards. For example, in *Lockett v. Ohio*, 438 U.S. at 607 (plurality opinion), the Ohio statute permitted the sentencing judge to consider mitigating evidence, but only if the evidence related to the specific subjects of the three statutory mitigating circum-

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[2] Moreover, the Court has rejected arguments that a state statute can be defective because it affords the jury *too much* latitude in determining what evidence should be considered mitigating and how much effect should be given to that evidence. In *Gregg v. Georgia*, 428 U.S. 153, 197 (1976), the Court rejected petitioner's argument that Georgia's then-new statute was unconstitutional for permitting "arbitrary grants of mercy" and because "the scope of the evidence and argument that can be considered at the presentence hearing is too wide." *Id.* at 200; *see also Zant v. Stephens*, 462 U.S. 862, 875, 879 (1983).

stances. *Id.* at 608. The plurality explained that the "limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments." *Id.*

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court again was confronted with sentencing processes that allowed consideration of some, but not all, of the mitigating evidence presented. The state trial court, affirmed by the state court of appeals, considered the petitioner's youth to be the only mitigating factor and refused to consider as potentially mitigating the evidence regarding petitioner's violent background, including his unhappy upbringing and emotional disturbance. *See id.* at 109-10, 113-14. This Court reversed, concluding that the evidence was mitigating and had been improperly excluded from consideration:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any mitigating evidence . . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-14.

In 1987, this Court made explicit the direct connection between full consideration of mitigating evidence and the constitutional mandate that jurors be allowed to express fully their reasoned moral response to such evidence. In *California v. Brown*, 479 U.S. 538 (1987), the Court considered whether the rule of *Lockett* and *Eddings* was infringed by an instruction that jurors not consider "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" during their penalty phase deliberations. *Id.* at 539. The Court decided that this cautionary instruction did

not preclude the jurors from properly evaluating the defendant's evidence. *Id.* at 541-42.

Justice O'Connor wrote separately and addressed what she perceived as the larger issue in the case, namely, the scope of the defendant's constitutional entitlement to consideration of his mitigating evidence, and how the challenged instruction might affect that right. *Brown*, 479 U.S. at 545-46 (O'Connor, J., concurring). Recognizing that criminal punishment jurisprudence in general had long focused on "culpability" in sentencing decisions, and that capital punishment systems in particular sought to ensure that any decision was "sensible to the uniqueness of the individual," Justice O'Connor stated that "*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 545 (citation omitted). Accordingly, she reasoned, "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." *Id.* Incorporating the *Lockett* definition of relevant mitigating evidence, Justice O'Connor concluded that only such an open and individualized inquiry would result in a sentence that reflects "a reasoned *moral* response to the defendant's background, character, and crime." *Id.* (emphasis in original).

That same term, this Court reconsidered the statute that it had facially approved in *Proffitt v. Florida*, 428 U.S. 242 (1976), and determined that *in practice* the Florida scheme could deny the jury full authority to consider and give effect to mitigating evidence. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987). Hitchcock had introduced mitigating evidence:

> that as a child [he] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that [he] had been one of seven children in a poor family that earned its living by picking cotton;

> that his father had died of cancer; and that [he] had been a fond and affectionate uncle to the children of one of his brothers.

Id. at 397. This Court observed that the Florida statute under which Hitchcock was sentenced confined consideration of "mitigating circumstances" to those enumerated in the statute. Because Hitchcock's mitigating evidence could not be fully considered within the enumerated mitigating circumstances, the Court unanimously concluded that the Florida procedure deprived Hitchcock of his right to an individualized determination of sentence. *Id.* at 399.

The Court noted that Hitchcock's trial counsel had urged the jury to focus on the "overall picture" of his client, in addition to considering those facts that supported the enumerated mitigating circumstances in the former Florida statute. *Hitchcock*, 481 U.S. at 397-98. Counsel also urged the sentencing judge (after the jury's adverse recommendation) to consider Hitchcock's troubled back-ground as he decided Hitchcock's punishment. *Id.* Consideration of such background evidence is essential to a reasoned moral response. Thus, although the vocabulary of *Hitchcock*'s Eighth Amendment analysis was not yet Justice O'Connor's, its result closely reflected the spirit of the concurrence in *Brown*.[3]

Similarly that term, in *Sumner v. Shuman*, 483 U.S. 66 (1987), the Court held that even a very narrowly defined, highly aggravated category of murder—*i.e.*, murder com-

[3] *Hitchcock*, like the present cases, involved a reexamination—in light of *Lockett* and *Eddings*—of a statute previously found facially constitutional. Although in 1976 the statute approved in *Proffitt* had not "clearly operated . . . to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," experience demonstrated that the statute as applied had precisely such an effect in cases where the defendant's mitigating evidence did not fit neatly or exclusively into the categories enumerated by the *Proffitt* scheme. *See Penry*, 492 U.S. at 317 (quoting *Lockett*, 438 U.S. at 607).

mitted by a prisoner already serving a sentence of life without parole—could not justify an automatic sentence of death. *Id.* at 81-82. As the Court reasoned,

> [t]hese two elements of capital murder[4] do not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case . . . . Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant *deserves to be sentenced to death* for a later murder, but the inferences to be drawn concerning an inmate's character *and moral culpability* may vary depending on the nature of the past offense.

Id. at 78, 81 (emphases added). Here, for the first time, a majority of the Court identified the capital sentencing jury's task as "drawing inferences" about the defendant's "*moral* culpability," based on relevant mitigating evidence.

This sentencing process of coming to a decision that is both reasoned and moral begins with the defendant's right to *introduce* any and all relevant evidence touching on the character and background of the defendant and the circumstances of the offense. But it does not end there. A sentence of death may be imposed only after the sentencer is empowered to *consider and give full effect* to such evidence.

In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), the Court again addressed the relationship between the requirement of unrestricted consideration of mitigating evidence and the need to base a defendant's sentence on a reasoned moral response to the defendant, his background and character, and his offense. A divided Court ruled in *Franklin* that a defendant's evidence of a clean prison disciplinary record

[4] The two elements were "that [the defendant] had been convicted of murder while in prison, [and] that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without possibility of parole." 483 U.S. at 78.

could adequately be considered under the Texas special issues scheme. Justice O'Connor (joined by Justice Blackmun) concurred only in the judgment, not in the plurality opinion. She concluded that, under the particular facts of the case, the Texas scheme fairly addressed the defendant's evidence because the full mitigating meaning of his clean prison record could be considered *within* the second special issue, *i.e.*, the issue relating to future dangerousness. At the same time, Justice O'Connor emphasized that the "principle underlying *Lockett, Eddings*, and *Hitchcock*, is that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 184 (O'Connor, J., concurring in the judgment). She observed that, if the

> petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence.

Id. at 185.

The three dissenting justices echoed Justice O'Connor's reasoning, stating that the jury must "not merely . . . be allowed to hear any such [mitigating] evidence the defendant desires to introduce, . . . [but it also must] be allowed to give 'independent mitigating weight' to the evidence." *See id.* at 191-92 (Stevens, J., dissenting) (internal citations omitted). Thus, five Justices in *Franklin* agreed that a sentencing scheme that does not permit the sentencer to consider and give full effect to mitigating evidence would run afoul of the Constitution.

Franklin showed that *Jurek v. Texas*, 428 U.S. 262 (1976), sustaining the facial validity of the former Texas statute, remained in effect: the former Texas special issue scheme

did not *invariably* prevent the sentencer from giving adequate consideration and effect to mitigating evidence. But *Franklin* also implied that in some cases the former scheme would not permit the sentencer to give adequate consideration and effect to a defendant's personal moral culpability, and that, in such circumstances, the scheme would not comport with the Eighth Amendment's guarantee of individualized sentencing.

One year later, in *Penry I*, the Court recognized precisely this point. *Penry I* confirmed that full sentencer consideration of mitigating evidence is the *sine qua non* of a reasoned moral response. The Court emphasized that "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing the sentence." 492 U.S. at 319. The Court explained that "[r]ather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned *moral* response to the defendant's background, character, and crime." *Id.* at 328 (internal quotations omitted) (emphasis in original). To be constitutional, therefore, a death penalty sentencing structure must provide the jury "with a vehicle for expressing its 'reasoned moral response'" to the mitigating evidence. *Id.* The questions that the Texas jury answered in determining the defendant's sentence did not provide that requisite vehicle in *Penry I*, and, thus, the Court reversed in relevant part and remanded for resentencing. *Id.*

Nothwithstanding this Court's explanation of the direct link between consideration of mitigating evidence and the sentencer's ability to provide a reasoned moral response to the defendant and his offenses, the Texas trial and appellate courts "misapprehended" the decision in *Penry I*. This Court, therefore, was required in *Penry II* to explain further the requirement that the jury be allowed not only to consider, but also to give effect to, mitigating evidence. 532 U.S. at 797. The Court stressed that "*Penry I* did not hold that the mere

mention of 'mitigating circumstances' to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may 'consider' the mitigating circumstances in deciding the appropriate sentence." *Id.* Instead, the Court stated, "the key under *Penry I* is that the jury be able to 'consider and give effect to [a defendant's mitigating] evidence in imposing sentence.'" *Id.* (quoting *Penry I*, 492 U.S. at 319) (alterations in original). The requirement that the sentencer treat the defendant as a uniquely individual human being thus depends on the sentencer having a "'vehicle for expressing its reasoned moral response to [the mitigating] evidence in rendering its sentencing decision.'" *Id.* (quoting *Penry I*, 492 U.S. at 328).

II. THE COURT'S DECISIONS ON THE FORMER TEXAS CAPITAL SENTENCING SCHEME REQUIRE TEXAS SENTENCING JURIES TO BE ABLE TO CONSIDER, AND GIVE FULL EFFECT TO, MITIGATING EVIDENCE.

Since *Furman v. Georgia*, 408 U.S. 238 (1972), the Court has had a number of opportunities to apply the foregoing principles to cases presenting constitutional challenges to the Texas capital sentencing statute that was in effect during Smith's and Tennard's trials. The Court considered a facial challenge to the former Texas capital sentencing statute—the same statute at issue in Smith's and Tennard's cases—in *Jurek v. Texas*. The plurality in *Jurek* concluded that the Texas statute is constitutional because of the narrowed definition of capital murder, combined with the jury's opportunity to consider whatever mitigating evidence the defendant presents:

> By *narrowing its definition of capital murder*, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By

> authorizing the defense to bring before the jury at the separate sentencing hearing *whatever mitigating circumstances relating to the individual defendant can be adduced*, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function.

428 U.S. at 276 (emphasis added). Thus, *Jurek* did not rest on the idea "that the Special Issues performed a narrowing function; rather [the Court's] concern . . . was whether the Special Issues interfered with the jury's full consideration of mitigating evidence." *See Franklin*, 487 U.S. at 196 (Stevens, J., dissenting).

Whereas *Jurek* posed only a facial challenge to the Texas death sentencing scheme, *Franklin v. Lynaugh* presented the first "as-applied" challenge to the Texas statute. *See Franklin*, 487 U.S. at 171; *Johnson v. Texas*, 509 U.S. 350, 383 (1993) (O'Connor, J., dissenting). In *Franklin*, four Justices concluded that the mitigating evidence of good behavior in prison was relevant only to the issue of future dangerousness. 487 U.S. at 177-79. Justices O'Connor and Blackmun concurred in the judgment because they agreed that, under the circumstances of that case, evidence of good behavior in prison "had no relevance to any other aspect of petitioner's character." *Id.* at 185 (O'Connor, J., concurring in the judgment). They disagreed, however, with the plurality on the issue of whether the state may limit the sentencer's ability to give effect to the mitigating evidence:

> [I]t is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty. Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would

> be meaningless unless the sentencer was also permitted to give effect to its consideration.

Id. at 184-85. And on this point, Justices Stevens, Brennan, and Marshall, in a dissenting opinion, agreed: "[N]othing in *Jurek* implies that the Special Issues could be used to curtail the defendant's right to have the sentencing decision made on the basis of all relevant mitigating evidence." *Id.* at 197-98 (Stevens, J., dissenting). Thus, a majority of the Justices in *Franklin* concluded that a State may not limit a sentencer's ability to give effect to mitigating evidence.[5]

Penry I demonstrates that the concurring and dissenting Justices in *Franklin* were correct that *Jurek* did not foreclose all as-applied challenges to the constitutionality of the Texas death sentencing scheme. Rather, the petitioner in *Penry I* simply asked that the State "fulfill the assurance upon which *Jurek* was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." *See Penry I*, 492 U.S. at 315. As the Court had observed in *Jurek*, a unique aspect of the former Texas scheme is that it did not explicitly refer to, or provide for, the consideration of mitigating evidence. *Id.* at 316; *see also* 428 U.S. at 272. Instead, it relied entirely on the special issues.

Penry I held that Penry's mitigating evidence—evidence of mental retardation and childhood abuse—had relevance

[5] Five Justices in *Franklin* also agreed that evidence may be relevant to the sentencing determination of moral culpability but at the same time be beyond the scope of the special issues. *Franklin*, 487 U.S. at 186 (O'Connor, J., concurring in the judgment); *id.* at 190-91 (Stevens, J., dissenting). The concurrence observed, for example, that "[e]vidence of voluntary service, kindness to others, or of religious devotion might demonstrate positive character traits that might mitigate against the death penalty." *Franklin*, 487 U.S. at 186 (O'Connor, J., concurring in the judgment); *see also id.* at 190 (Stevens, J., dissenting).

beyond the scope of any of the three special issues. Whatever bearing it may have had on those issues, it was additionally and constitutionally relevant because it also shed light on his moral culpability. *Penry I*, 492 U.S. at 322-25. The jury could have concluded that Penry acted deliberately, would be a future danger, and acted unreasonably in light of the lack of provocation by the decedent (*i.e.*, could have answered all of the special issues affirmatively), while also concluding that Penry was less morally culpable or blameworthy for his crime, and thus not deserving of a death sentence. *See id.* Yet the jury "was only able to express its views on appropriate sentence by answering [the] three questions." *Id.* at 320. Thus, "a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326.

The Texas legislature clearly understood after the Court's *Penry I* decision that moral culpability relates to something more than the criminal act. After this Court's decision in *Penry I*, the Texas capital sentencing statute was amended (effective September 1, 1991) to provide that an additional open-ended mitigating evidence question would be presented to the jury if the jury answered "yes" to the first two special issue questions:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Tex. Crim. Proc. Code Ann. art 37.071, § 2(b)(1), (2). Thus, the Texas legislature drafted a statute that, in keeping with this Court's decisions, requires what was missing in the pre-1991 Texas capital sentencing scheme under which Smith and

Tennard were sentenced to die—an opportunity to consider and give full effect to all mitigating evidence.

By enacting this change, the Texas legislature addressed the constitutional problems of the former statute. As Judge Higginbotham pointed out in his concurring opinion in *Robertson v. Cockrell*, "[i]t is no surprise that Texas wisely moved to the common sense solution of asking the jury an additional question: whether, considering all the mitigating evidence, death should be imposed." 325 F.3d 243, 258 (5th Cir.) (en banc) (Higginbotham, J., concurring), *cert. denied*, 124 S. Ct. 28 (2003). The Fifth Circuit's constricted application of *Penry I* and its insistence on the adequacy of the former special issues in any case but one that precisely mirrors *Penry*'s facts is inconsistent not only with the message sent by the Texas legislature more than a decade ago, but also with this Court's numerous decisions on the proper treatment and significance of mitigating evidence.

Since *Penry I*, the Court has entertained two other challenges to the application of the former Texas capital sentencing scheme in cases not involving John Penry. Both *Graham v. Collins*, 506 U.S. 461 (1993), and *Johnson v. Texas*, 509 U.S. 350 (1993), presented the issue of whether the unadorned special issues adequately allowed jurors to consider mitigating evidence of youth.[6]

In *Graham*, the petitioner's conviction became final on September 10, 1984, several years before the Court's decision in *Penry I*. *See Graham*, 506 U.S. at 468. The case presented a collateral attack on the sentence, and thus the Court was obliged under *Teague v. Lane*, 489 U.S. 288 (1989), to "'determine, as a threshold matter, whether granting [Graham] the relief he seeks would create a new rule' of

[6] The two cases came to the Court in different procedural postures. *Graham* involved a petition for a writ of habeas corpus. *See Graham*, 506 U.S. at 466-67. *Johnson* came before the Court on direct review. *See Johnson*, 509 U.S. at 352.

constitutional law." *Graham*, 506 U.S. at 466-67 (quoting *Penry I*, 492 U.S. at 313). The Court concluded that Graham was seeking a new rule. *See id.* at 468. Thus, instead of reaching the merits of Graham's claims, the Court considered only the different question of whether "reasonable jurists hearing [Graham's] claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor." *Id.* at 467 (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)); *see also Johnson*, 509 U.S. at 378 (Souter, J., dissenting). The Court answered that inquiry in the negative, and therefore ruled that it was barred from granting relief. *Graham*, 506 U.S. at 467.

In *Johnson*, there was no "*Teague*" problem because the case came to the Court on direct review. *See Johnson*, 509 U.S. at 366. Although *Graham* was decided on the narrow procedural ground just described, the majority in *Johnson* nonetheless relied considerably on *Graham* in rejecting Johnson's constitutional claim that the sentencing jury was deprived of the opportunity adequately to consider and give effect to his mitigating evidence of youth. *See id.* at 365-67; *see also id.* at 378 (Souter, J., dissenting). The majority concluded that Johnson's mitigating evidence of youth could be considered fully under the "future dangerousness" special issue. *Id.* at 369-72. The Court stated that "[i]t is both logical and fair for the jury to make *its determination of a defendant's future dangerousness* by asking the extent to which youth influenced the defendant's conduct." *Id.* at 369 (emphasis added). The Court further explained that "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Id.* at 370.

Johnson thus stands for the limited proposition that in the circumstances of that case the single item of mitigating evidence at issue—petitioner's youth—could be adequately

addressed under the second special issue. It established no more general rule, as the subsequent decision in *Penry II* demonstrates.[7]

In *Penry II*, the Court reviewed the trial court's supplemental instruction, which was developed in response to *Penry I*, and concluded that it failed to address the problem that the Court had identified in *Penry I*—namely that "none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to the evidence of Penry's mental retardation and childhood abuse." *See Penry II*, 532 U.S. at 791, 798. The supplemental instruction was nothing more than a hollow, cosmetic change: "Because the supplemental instruction had no practical effect, the jury instructions at Penry's second sentencing were not meaningfully different from the ones that we found constitutionally inadequate." *Id.* at 798. The jury still had no vehicle for expressing the view that Penry's mitigating evidence warranted life imprisonment rather than a death sentence.[8]

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[7] Any broader reading of *Johnson* would run counter to the Court's earlier decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987), in which the Court declared that "States *cannot limit* the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty. In this respect, the State *cannot channel* the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *Id.* at 306 (emphasis added). Thus, although the States must "establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold" for the death penalty, the same is not true of mitigating evidence. *McCleskey*, 481 U.S. at 305; *see also Penry I*, 492 U.S. at 326-27 (contrasting the constitutional need to narrow the class of murders eligible for the death penalty with the constitutional need to allow full consideration of mitigating evidence).

[8] *Williams v. Taylor*, 529 U.S. 362, 398 (2000), a case involving a death sentence imposed by a Virginia jury, demonstrates that some evidence that is relevant to the jury's sentencing determination is not

III. THIS COURT'S DECISIONS LEND NO SUPPORT TO THE ARTIFICIAL STANDARD THAT THE FIFTH CIRCUIT HAS DEVELOPED FOR DETERMINING WHETHER THE FORMER TEXAS SENTENCING SCHEME IMPERMISSIBLY RESTRICTED THE JURY'S ABILITY TO CONSIDER AND GIVE FULL EFFECT TO A DEFENDANT'S MITIGATING EVIDENCE IN A PARTICULAR CASE.

Both Tennard and Smith asked the Fifth Circuit to consider whether the pre-amendment Texas special issues provided the jury with a vehicle to give full effect to the mitigating evidence that each defendant presented during the sentencing phase of his trial. *See Smith v. Cockrell*, 311 F.3d 661, 677-79 (5th Cir. 2002); *Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002). In both cases, the court of appeals converted this inquiry into the question whether "the mitigating evidence introduced at trial was *constitutionally* relevant and beyond the effective reach of the jury." *Tennard*, 284 F.3d at 595 (emphasis added); *see also Smith*, 311 F.3d at 679-80. Since its decision in *Graham v. Collins*, 950 F.2d 1009, 1029-30 (5th Cir. 1992), *aff'd*, 507 U.S. 968 (1993), the Fifth Circuit has sought to limit the kinds of evidence to which this Court's decision in *Penry I* can apply. The court has used two phrases, "constitutionally relevant mitigating evidence" and "*Penry I* evidence," as labels for the increasingly narrow category of evidence that, in the lower court's view, warrants scrutiny under *Penry I*.

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encompassed completely by the concept of "future dangerousness." In *Williams*, the Court held that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* Thus, the Court acknowledged that all of the petitioner's mitigating evidence was relevant and should have been introduced, for reasons apart from the issue of the defendant's future dangerousness.

According to the Fifth Circuit, the only mitigating evidence that is "constitutionally relevant" is evidence that shows "'(1) a uniquely severe permanent handicap [] with which the defendant was burdened through no fault of his own, and (2) that the criminal act was attributable to this severe permanent condition.'" *Smith*, 311 F.3d at 680 (quoting *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir.), *cert. denied*, 516 U.S. 992 (1995) (internal quotation marks and citations omitted)); *Tennard*, 284 F.2d at 595 (same). As to the first of these two requirements, the Fifth Circuit has stated explicitly that the mitigating evidence must relate "either to severe mental retardation or extreme child abuse." *Smith*, 311 F.3d at 680. The second of these requirements is "essentially . . . a 'nexus' requirement," requiring a connection between the offense and the condition to which the mitigating evidence refers. *Smith*, 311 F.3d at 680-81; *Tennard*, 284 F.3d at 597.[9]

By requiring that mitigating evidence satisfy a threshold series of requirements before any inquiry into the adequacy of the former Texas sentencing scheme is even raised, the court of appeals has artificially narrowed this Court's decisions. Moreover, the court of appeals has circumvented the fundamental inquiry that this Court requires: whether the former Texas special issues in practice precluded the sentencer from considering and giving full effect to relevant mitigating evidence during the sentencing determination. *See Lockett*, 438 U.S. at 604 (plurality opinion); *Eddings*, 455 U.S. at 113-14; *Franklin*, 487 U.S. at 183; *see also Robertson*, 325 F.3d at 279 (Dennis, J., dissenting) ("Where our en banc decision in *Graham* and its progeny go wrong is by failing to ask the fundamental *Penry I* question of how, if

[9] As far as we are aware, the "uniquely severe permanent condition" requirement and the "nexus" requirement are peculiar to the Texas capital system and have not been applied in any other State or any other death penalty sentencing scheme.

at all, the Texas special issues allow a jury to give meaningful consideration to a particular piece of mitigating evidence.").

Nothing in either *Penry I* or the Court's other decisions supports the Fifth Circuit's decree that "*Penry I* evidence" must involve (1) either severe mental retardation or extreme child abuse and (2) a nexus to the crime. The Court's rationale for *Penry I* (and *Penry II*, for that matter) proceeds from the premise that the sentencing authority must be permitted to consider and give full effect to whatever mitigating evidence a capital defendant may present. If such evidence does not bear on future dangerousness but is mitigating in other ways, or if it does bear on future dangerousness but is potentially mitigating for other reasons as well, the "future dangerousness" special issue alone will not enable the sentencer to give full effect to the defendant's mitigating evidence. By definition, in such circumstances, the second special issue will channel the jury's consideration in a way that does not encompass the full mitigating force of the defendant's evidence. That is equally true whether the evidence is just like that presented by Penry or whether it falls in one of the numerous other categories that the court of appeals has held cannot qualify as "*Penry I* evidence." *See Smith*, 311 F.3d at 680 n.15 (listing cases presenting, *inter alia*, mitigating evidence of psychotic disorders and mental illness, diminished capacity and low intelligence, remorse, acceptance of responsibility and cooperation with the authorities, religious devotion, good character, troubled childhood, intoxication and substance abuse, efforts at betterment in prison, military service, and secondary role in the crime).

Indeed, in the dozens of cases in which the Fifth Circuit has applied its requirements for identifying "*Penry I* evidence," the court almost invariably has ruled that those requirements were not satisfied. We are aware of only one case in which the court of appeals has reached a different conclusion. *See Blue v. Cockrell*, 298 F.3d 318 (5th Cir.

2002). In *Blue*, the record evidence, presented through expert testimony, established Blue's complex treble disabilities of mental retardation, mental illness, and severe psychological disorder—the combination of which made it "almost inevitable that [Blue] would be in conflict with the law." *Id.* at 321. Thus, the only time the court of appeals has been prepared to conclude that its requirements for "*Penry I* evidence" were met, the evidentiary record was nearly strong enough to enable the defendant to present an actual defense to the charges on which he was convicted.

The court of appeals attempts to justify its nexus requirement by claiming that it "echoes the language of *Penry I*, where the Supreme Court found that Penry's mitigating evidence demonstrated that his criminal acts were 'attributable to' his disadvantaged background and mental problems." *Smith*, 311 F.3d at 680-81 (quoting *Penry I*, 492 U.S. at 304).[10] But this seeks to read into *Penry I* a restriction that is not there. To be sure, *Penry I* alluded to the "'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.'" *Penry I*, 492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). This language did not purport to create different categories of mitigating evidence, some of which would raise *Penry* concerns and others of which would not. The Court's remarks was descriptive, not restrictive. Taking this sentence entirely out of context, the Fifth Circuit has used it as a basis for engrafting its nexus requirement onto the *Penry I* decision. This is at odds with the guiding principle in death penalty cases that the sentencer must be allowed to consider and give full effect to all mitigating evidence.

[10] The *Penry I* page cited by the Fifth Circuit is actually the syllabus, not the Court's opinion.

The Fifth Circuit's narrow conception of "constitutionally relevant mitigating evidence" contradicts a long line of this Court's decisions about what is relevant mitigating evidence. In *Lockett v. Ohio*, the plurality recognized that relevant mitigating evidence includes "any aspect of the defendant's character or record and any of the circumstances of the offense that a defendant proffers as a basis for a sentence less than death." *See Lockett*, 438 U.S. at 604 (plurality opinion). In *Hitchcock*, the petitioner presented evidence about his childhood habit of inhaling gasoline fumes, the poverty of his family, his father's death of cancer, and his active role as an uncle to the children of one of his brothers. 481 U.S. at 397. The Court ruled that the petitioner's difficult upbringing and his potential for rehabilitation were relevant to the sentencing determination and that the advisory jury had to be allowed to consider those circumstances. *Id.* at 399. None of that evidence involved a handicap, much less a severe and permanent one, and none of that evidence therefore would qualify as "constitutionally relevant," in the Fifth Circuit's lexicon. *See also Eddings v. Oklahoma*, 455 U.S. at 109-10 (constitutional requirement to consider evidence of defendant's unhappy upbringing and emotional problems, neither of which would qualify as "*Penry I* evidence" in the Fifth Circuit); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (constitutional requirement to consider good prison behavior, even though it plainly does not involve a uniquely severe permanent handicap, and even though it plainly was not the cause of petitioner's offense).[11]

[11] *See also Johnson*, 509 U.S. at 381 (O'Connor, J., dissenting) (stating that in *Skipper*, "we reiterated that evidence, even if not 'related specifically to petitioner's culpability for the crime he committed,' must be treated as relevant mitigating evidence if it serves 'as a basis for a sentence less than death'" (quoting *Skipper*, 476 U.S. at 5) (internal citations and quotation marks omitted)); *Eddings*, 455 U.S. at 113-14 (reversing sentence because lower courts, in violation of *Lockett*,

The Fifth Circuit's standard for what constitutes relevant mitigating evidence runs counter to *Eddings* for yet another reason. In *Eddings*, the Court held that the sentencer is entitled to determine the weight to be given to mitigating evidence in deciding whether a defendant should be sentenced to death. *See* 455 U.S. at 113-14 ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."). But if the Fifth Circuit's standard of relevance were taken to its logical conclusion, a trial court could determine that because the evidence is not constitutionally relevant, it should not even be introduced to the jury. Such a result clearly would be inconsistent with this Court's decisions and demonstrates that the Fifth Circuit's "constitutionally relevant" mitigating evidence limitation is flawed. As Judge Stewart wrote in the court of appeals, "the type of mitigating evidence is inapposite to the analysis. The mere fact that there is mitigating evidence is what prevails." *See Robertson*, 325 F.3d at 273 (Stewart, J., dissenting) (citing *Williams v. Taylor*, 529 U.S. 362 (2000)).[12]

Finally, it is worth noting that the "future dangerousness" special issue, as applied, has proved especially hospitable to all manner of evidence that Texas has sought to introduce in an effort to persuade juries to impose the death penalty, whereas it is, for the reason described above, an ill-fitting

apparently had "considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability").

[12] "It is not for [the Fifth Circuit] to stand in the shoes of the jury in the sentencing phase of a capital trial and determine the quality and quantity of the mitigation evidence placed before them." *Robertson*, 325 F.3d at 271 (Stewart, J., dissenting); *see id.* at 272 ("It is not up to the [Fifth Circuit] to determine the strength of the mitigating evidence, the [Fifth Circuit's] only responsibility is to ensure that the instructions did not prevent the jury from considering the evidence.").

vehicle for juries to use in providing a "reasoned moral response" to mitigating evidence presented by defendants. Texas courts have ruled, for example, that a jury's affirmative answer to the "future dangerousness" question can properly be based, at least in part, on evidence that a defendant had previously "unlawfully shot a cow" or "wantonly shot and killed a buffalo," *Farris v. State*, 819 S.W.2d 490, 497-98 (Tex. Crim. App. 1990); that the defendant was truant, smoked cigarettes, and disrupted classes in high school, *Kunkle v. State*, 771 S.W.2d 435, 446 (Tex. Crim. App. 1986); and that the defendant had a "bad reputation" in several communities, *Willis v. State*, 785 S.W.2d 378, 387 (Tex. Crim. App. 1989).[13] In none of these cases was Texas obliged to demonstrate any "nexus" between the State's evidence and the underlying offense. If the Fifth Circuit's conception of "constitutionally relevant" mitigating evidence were permitted to stand, then surely comparable limitations would need to be imposed on the kinds of evidence on which the State properly could rely to support imposition of a capital sentence.

[13] The Texas Court of Criminal Appeals has stopped short of attributing aggravating effect to evidence that the defendant previously had participated in football and hunting. The court rejected the State's argument "that participation in these so called 'violent sports' demonstrate[s] future dangerousness." *Ellason v. State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1990).

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted,

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